FILE COPY

FILED
OCT 1 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 14.

ALBERT BENJAMIN CHANDLER, Individually and as Governor of the Commonwealth of Kentucky, Et Al., - - - - - - - Petitioners,

versus

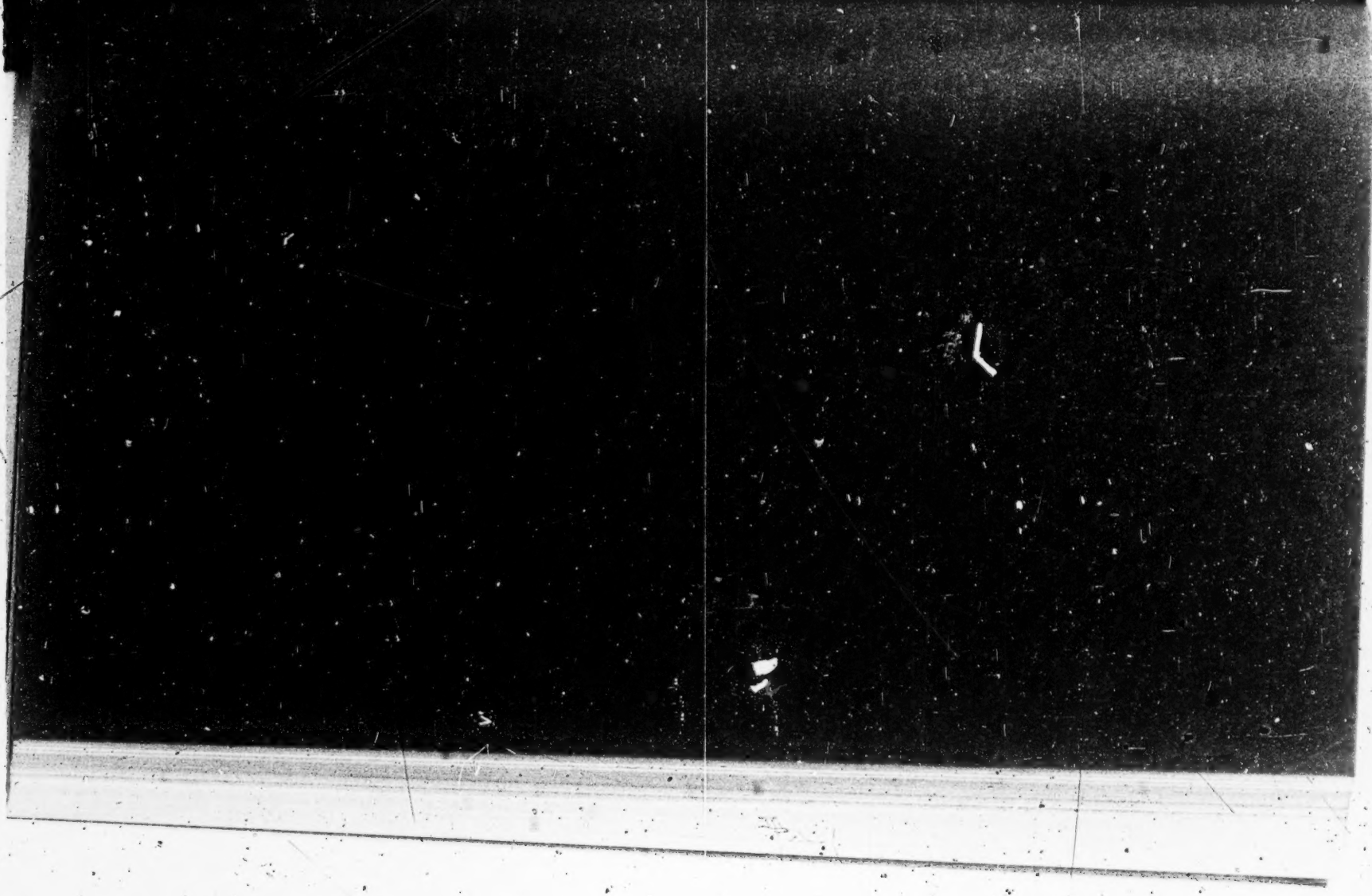
JAMES E. WISE and RAY B. MOSS, - - Respondents.

BRIEF FOR RESPONDENTS.

LAFON ALLEN,
OLDHAM CLARKE,
Solicitors for Respondents.

October 1, 1938.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.



SUBJECT INDEX.

	PAGE
References to official reports	1
Jurisdiction	2–3
Statement of the case	3–11
Summary of argument	11–12
Argument	12–60
Introduction	12–17
Grounds of decision below	18
I. State action upon a proposed amendment exhausts the power invoked by the proposal of the amendment	18–36
II. The proposal of the Child Labor Amendment was defeated in 1925, upon the thirteenth affirmative rejection	36–42
III. The proposal was not pending before the States in January, 1937, when the Kentucky legislature attempted to ratify	42–60
Conclusion	60–62
Appendix A.: Table showing action by States on Child Labor Amendment, 1924-1937, inclusive	1–2
Appendix B.: Federal Constitution, Article V; Act of Congress, April 20, 1818	3
Appendix C.: Resolution of Kentucky legislature, March 24, 1926, rejecting Child Labor Amendment	4–5
Appendix D.: List of recent legal literature on constitutional amendment	6–10

TABLE OF AUTHORITIES.

CASES CITED:

PAGE

Coleman, et al., v. Miller, et al., 146 Kan. 390, 71 Pac. (2d) 518 ..... 11, 58

Dillon v. Gloss, 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994 ..... 2, 13, 14, 18, 20, 46, 47, 48, 49, 51, 57

Hawke v. Smith, 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 1504 ..... 2, 19, 30

Leser v. Garnett, 258 U. S. 130, 42 S. Ct. 217, 66 L. Ed. 505 ..... 3, 19

Nashville, C. & T. R. Co. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730 3

National Prohibition Cases, 253 U. S. 350, 40 S. Ct. 486, 64 L. Ed. 946 ..... 19, 20, 23, 30

Stickler v. Higgins, 269 Ky. 260, 106 S. W. (2d) 1008 5

U. S. v. Chambers, 291 U. S. 217, 54 S. Ct. 434, 78 L. Ed. 763 47

TEXTS CITED:

Bodley and Wilson, "History of Kentucky" 22

Cadwalader, Thos. F., "Amendment of the Federal Constitution", LX Am. Law Review, 385 40

Congressional Record, 41st Cong. 31

Congressional Record, 65th Cong. 44

"Documentary History of the Constitution", Vol. II 24, 26, 31

Dodd, W. F., "Amending the Federal Constitution", XXX Yale Law Journal 36

Garrett, "Amending the Federal Constitution", 7 Tenn. Law Review, 286 15

Grinnell, Frank W., "A 'Point of Order' on the 'Child Control' Amendment", Am. Bar. Asso. Journal, July, 1934; reprinted in Mass Law Quarterly, Aug., 1934 38

TEXTS CITED—Cont'd: PAGE

Hadley, Arthur Twining, "Standards of Public Morality". 39

Jameson, "A Treatise on Constitutional Conventions", 1st Ed. 18, 27, 29, 42

Jameson, 4th Ed. 28, 35

Orfield, Lester B., "The Federal Amending Power", 24 Ill. Law Review, 418. . . . . 18, 28, 48

Watson, David K., "Constitution of the U. S.", Vol. II. 35

STATUTES AND CONSTITUTIONAL PROVISIONS CITED:

Constitution of the United States, Article V. 3

Act of Congress of April 20, 1818 (U. S. Rev. Stats., §205, 5 U. S. C. A., §160). 3

Kentucky Session Acts, 1865 22

Kentucky Session Acts, 1926 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 14.

ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY, ET AL., - *Petitioners,*

v.

JAMES E. WISE AND RAY B. MOSS, - *Respondents.*

BRIEF FOR RESPONDENTS.

REFERENCE TO OFFICIAL REPORTS OF OPINIONS DELIVERED BY COURT BELOW.

Wise, et al., v. Chandler, et al., 270 Ky. 1, 108 S. W. (2d) 1024.

Chandler, et al., v. *Wise, et al.*, 271 Ky. 252, 111 S. W. (2d) 633.

The opinions of the court below are printed in full in the Transcript of Record (R. 33 and 34-55).

JURISDICTION.

(1) The judgment to be reviewed was entered by the Court of Appeals of Kentucky on December 17, 1937 (R. 33).

The Court of Appeals is the highest court of the Commonwealth of Kentucky in which a decision in this suit could be had (Constitution of Kentucky, §§109 and 110).

(2) The specific claim advanced, and the ruling made, in the lower court which is relied upon as the basis of this Court's jurisdiction, was that the resolution of the Legislature of Kentucky adopted January 13, 1937, purporting to ratify the proposed Amendment to the Constitution of the United States giving to the Congress the power to limit, regulate and prohibit the labor of persons under eighteen years of age, which Amendment was proposed by the Congress on June 2, 1924, was not adopted in accordance with the requirements of Article V of the Constitution of the United States and was, therefore, inoperative as an act of ratification (R. 6, 30, and 33).

(3) The jurisdiction of this Court is invoked under the United States Code, Title 28, §237, amended: 28 U. S. C. A., §344(b); 8 F. C. A., Title 28, §344(b).

(4) The following cases are believed to sustain the jurisdiction of this Court in the instant case:

Dillon v. *Gloss*, 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994;

Hawke v. *Smith*, 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 1504;

Leser v. *Garnett*, 258 U. S. 130, 42 S. Ct. 217, 66 L. Ed. 505;

Nashville, C. and T. R. Co. v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730.

STATEMENT OF THE CASE.

The facts of the case are not in dispute. The judgment affirmed by the court below was entered upon the petition of plaintiffs (respondents here), after the general demurrer of defendants (petitioners here) had been overruled and they had declined to plead further (R. 29 and 33).

On June 2, 1924, the Congress of the United States duly proposed to the States an amendment of the Federal Constitution, commonly referred to (and herein referred to) as the Child Labor Amendment, which when ratified by the legislatures of three-fourths of the several States should be valid to all intents and purposes as part of the Constitution (R. 2 and 24).

On March 24, 1926, the Kentucky Legislature considered this proposal and duly resolved, both Houses concurring, that the proposed amendment be rejected, for reasons stated in the preamble of the resolution (Appendix D), and that certified copies of the resolution be forwarded by the Governor of Kentucky to the Secretary of State of the United States; to the Presiding Officer of the United States Senate and to the Speaker of the House of Representatives of the United States (R. 3).

The Governor of Kentucky duly forwarded the certificates mentioned in the resolution (R. 3).

On March 24, 1926, including the resolution of the Kentucky Legislature of that date, the Congressional proposal had been considered by the Legislatures of 41 States, had been ratified by 4 of them, had been affirmatively rejected by both Houses of the Legislatures of 24 States, had been affirmatively rejected by resolution of one House of the Legislatures of 6 additional States and had been defeated by adverse action on resolutions of ratification in the legislatures of 7 additional States (R. 9, 13-17).*

At the end of the calendar year 1932, the action of the States, through their respective legislatures, on the proposal stood 6 ratifications and 36 refusals to ratify (R. 10) or, if the 6 States which had taken no action at all be counted as against the proposal, the result was 6 for and 42 against it.†

On December 23, 1936, the Governor of Kentucky issued a proclamation, stating that an emergency existed and convening the General Assembly of Kentucky in extraordinary session for the purpose of considering certain enumerated subjects, not including the Child Labor Amendment (R. 3).

On Friday, January 8, 1937, he issued a so-called amendment to the proclamation of December 23, 1936,

*A complete and more graphic presentment of the history of this proposal before the States will be found in the table designated "Appendix A" and inserted at the end of this brief.

†In point of fact, these six States did act upon the proposal after 1932, two of them ratifying it (in 1933) and four rejecting it (ten times) during 1934-1937.

so as to add to that proclamation the single subject of action on the Child Labor Amendment (R. 3-4)‡

On Tuesday, January 12, 1937, after a two-day, week-end recess of the legislature, the Senate adopted a resolution purporting to ratify the Amendment and on the following day the House of Representatives concurred therein (R. 4).

This attempted ratification of the Amendment was completed within three legislative days after the Governor's amended proclamation had given notice to the public for the first time that action upon the proposed Amendment was contemplated, after almost eleven years of uninterrupted adherence to the decision to reject the Amendment, taken on March 24, 1926.

On Friday, January 15, 1937, shortly after eight o'clock a. m., respondents (plaintiffs and appellees below) filed their petition in the office of the Clerk of the Franklin Circuit Court, praying a judicial declaration, as authorized by the law of Kentucky (Carroll's Code of Civil Practice, Title XIV, Ch. IVa, §§639a-1 to 639a-12), that the above mentioned resolution of the Kentucky Legislature, purporting to ratify the Amendment was invalid and inoperative as a ratification, for the following reasons: (a) because its affirmative rejection of the Amendment on March 24, 1926, had exhausted its power to act upon that proposal (R. 3), (b)

‡The right of the Governor to amend his call of the special session, during that session, was sustained in a case (*Stickler* v. *Higgins*, 269 Ky. 260, 106 S. W., 2d, 1008), which was decided pending the first appeal of this case, in consequence of which the claim made in the original petition herein (R. 5 and 6) that the resolution of ratification, adopted under the amended call, was invalid because in violation of the Constitution of Kentucky, was abandoned.

because the proposal was conclusively defeated in 1925, when it had been affirmatively rejected by more than one-fourth of the States (R. 3), and (c) because its attempted ratification on January 13, 1937, was not taken within a reasonable time after its proposal by the Congress on June 2, 1924 (R. 5). Respondents further prayed that the petitioners (defendants and appellants below) be enjoined from notifying in any manner the Secretary of State of the United States of the action of the Kentucky Legislature in attempting to ratify the Amendment (R. 6).

Immediately upon the filing of the petition, a temporary restraining order was duly entered against each of the Petitioners (R. 8) and attested copies of said order, together with summons addressed to each of the Petitioners (R. 7) were placed in the hands of the Sheriff of Franklin County and by him given to two of his deputies, with instructions for immediate service (R. 11).

At 9:05 o'clock a. m. on that day, said deputy sheriffs proceeded by automobile to the State Capitol, five or six city blocks distant from the Sheriff's office, for the purpose of serving the papers which had been delivered to them, having been instructed by the Sheriff to make the first service, if possible, upon the Petitioner, Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky. The deputy sheriff charged with the duty of serving the Governor went at once to his office but was denied admittance to him and, despite a continuous endeavor to get access to the

Governor, was unable to do so until after the Governor had meanwhile deposited in the post office at Frankfort, Kentucky, a registered letter, addressed to the Secretary of State of the United States at Washington, with inclosed certified copy of the resolution aforesaid purporting to ratify the Amendment (R. 11).

At the time when the deputy sheriff first endeavored to obtain service upon the Governor, the certified copy of the resolution had not then been forwarded to the Secretary of State in Washington (R. 11).

At the time when the Petitioner, Albert Benjamin Chandler, Governor, was served with the summons and restraining order in this case, no notice of the purported ratification of the Amendment had been given to the Secretary of State of the United States (R. 12).

On January 16, 1937.* Respondents filed in the Franklin Circuit Court an amended petition in which they set forth the issuance of the summons and restraining order, above mentioned, the attempt of the deputy sheriff to serve the Governor, the refusal to allow him admission to the Governor for that purpose and the subsequent deposit in the post office at Frankfort of an envelope addressed to the Secretary of State of the United States at Washington and containing the certified copy of the resolution of ratification (R. 9-12).

Upon these averments, Respondents prayed that a mandatory injunction be issued, requiring the Gov-

*In the printed transcript of record the date of the filing of this amended petition is given as February 20, 1937, an error which doubtless resulted from the confusion of this amendment with the second amendment which was filed on February 20, 1937. The true date of the filing of the first amended petition, to-wit, January 16, 1937, is shown by the jurat, which was omitted in printing.

ernor and the other defendants named in their original petition (Petitioners here) to notify forthwith the Secretary of State of the United States by registered mail that, before the sending of the attested copy of the purported resolution of ratification to him, the validity of that resolution as an act of ratification of the Amendment had been challenged in this proceeding, that before the receipt of said copy by the Secretary of State the Governor had been restrained by order of court from giving such notice in any manner and that any notice given in violation of said restraining order was null and void (R. 12).

On February 20, 1937, Respondents filed their second amended petition (R. 12), in which, among other things, they alleged that on January 15, 1937, the Governor was served with summons and restraining order and that the Secretary of State of the United States did not receive the Governor's letter, with a certified copy of the resolution of ratification, above mentioned, until 10:41 a. m. on January 18, 1937, or three days after the summons and restraining order had been served on the Governor (R. 17).

On March 2, 1937, a judgment was entered in the Franklin Circuit Court, sustaining Petitioners' demurrer to the petition as amended on the ground that the facts alleged were not sufficient to constitute a cause of action and, the Respondents declining to plead further, their petition was dismissed and an appeal granted to the Court of Appeals, with the provision that, upon the execution of a bond conditioned accord-

ing to law, an injunction pending said appeal should be allowed, to prevent the defendants or any of them (Petitioners here) from taking any action which would in any manner change the status existing immediately before the entry of the judgment (R. 27-28).

On November 6, 1937, the Court of Appeals of Kentucky issued its mandate, in accordance with its unanimous opinion handed down October 1, 1937, reversing the judgment of the Franklin Circuit Court and remanding the case to that Court with directions to overrule the demurrer to the petition and for such further proceedings as were not inconsistent with the views expressed in its opinion (R. 28).

On December 6, 1937, the Franklin Circuit Court ordered filed the opinion and mandate of the Court of Appeals and in accordance therewith overruled Petitioners' demurrer to Respondents' petition as amended and, Petitioners declining to plead further, entered a judgment to the following effect (R. 29-30):

(1) That an actual controversy existed between the parties to this case, that the plaintiffs had the right to maintain the suit and that the Court had jurisdiction of the cause;

(2) That the resolution of the Kentucky legislature of January 13, 1937, purporting to ratify the Child Labor Amendment, was invalid and void and that the Amendment was not thereby ratified according to the provisions of the Constitution of the United States;

(3) That the notice given by the Governor to the Secretary of State of the United States was of no effect;

(4) That the Clerk of the Franklin Circuit Court give official notice to the Department of State of the United States that the resolution was invalid, that the Amendment had not been ratified according to the Federal Constitution and that the notice given by the Governor to the Secretary of State of the United States was of no effect; that the Clerk of the Franklin Circuit Court send a duly authenticated copy of the judgment to the Secretary of State of the United States, by registered mail, with return receipt requested, to be filed herein;

(5) That the defendants (Petitioners here) be granted an appeal to the Court of Appeals of Kentucky.

On December 11, 1937, the Clerk of the Franklin Circuit Court complied with the direction given him by the judgment of that Court, as stated above, by addressing a letter to the Secretary of State of the United States in Washington, advising him of the terms of the judgment and inclosing an authenticated copy of the judgment. The receipt of this letter and the accompanying copy of the judgment was acknowledged by the Department of State by letter dated December 17, 1937.

On December 17, 1937, the Court of Appeals of Kentucky, the whole court sitting, filed a *per curiam* opinion, in which it declared that no new issue or additional question was presented on the second appeal and that it had not changed its view on any of the questions formerly presented, including those raised under the

Federal Constitution. It thereupon entered a judgment affirming the judgment of the Franklin Circuit Court (R. 33).

On March 30, 1938, the Petitioners (defendants and appellees below) filed in this Court their petition for a writ of certiorari, to which Respondents filed a brief in response, stating that, in view of the novelty and importance of the questions presented and of the conflicting decision of the Supreme Court of Kansas, now under review by this Court (*Coleman, et al.*, v. *Miller, et al.*, October Term, 1938, No. 7), they were not disposed to resist the application for the writ.

On April 11, 1938, this Court granted a writ of certiorari to review the judgment of the Court of Appeals in this case.

SUMMARY OF ARGUMENT.

I.

When a State takes affirmative action on a proposal for amendment of the Federal Constitution, whether by ratifying or rejecting it, its power is exhausted and its action upon that proposal cannot be retracted.

II.

When more than one-fourth of the States have affirmatively rejected such a proposal, the fate of that proposal is determined as conclusively as it would have been if three-fourths of the States had ratified it, even if a State had the power, prior to such determination, to reverse the action theretofore taken by it.

III.

In view of the history of the proposal of the Child Labor Amendment before the States, a reasonable time for its adoption had expired and it was no longer pending or open to action by any State at the time when the Kentucky legislature attempted to ratify the proposal, even though its original power to act had not theretofore been exhausted by the first exercise thereof nor had been terminated by the antecedent defeat of the proposal by the adverse votes of more than one-fourth of the States.

ARGUMENT.

Introduction:

The questions here presented for decision are strictly constitutional questions. They have no relation to the Child Labor Amendment which they would not have, in like circumstances, to any other amendment that might be proposed. They call for no discussion of the child labor "problem" itself nor of the solution of that problem. Whether the labor of persons under eighteen years of age should be limited or regulated or prohibited at all, or to what extent or in what manner, whether the power to do so should be left to the States, as heretofore, or should be granted to the Federal Government, as proposed, are matters foreign to this argument.

The questions here relate solely to the nature, the scope and the limitations of the powers granted or reserved by Article V of the Federal Constitution.

There is in this case no question merely of procedure. The haste with which the resolution of ratification was driven through the Kentucky legislature, in utter disregard of the known and inveterate hostility to the proposal of the public opinion of the State and certainly without the slightest opportunity for ascertaining a change in that opinion, if any there was, deprives the resolution of every vestige of respectability as an expression of the popular will. But no objection is made here on that ground. Although the proceedings in the legislature defied every principle of deliberative, representative government, we do not question the sufficiency of those proceedings to accomplish the ratification of the proposal, *if the legislature had power to act at all to that end.*

In the final analysis, therefore, we have only questions of power.

Was the power of the Kentucky legislature, which had been invoked by the Congressional proposal, exhausted by the decision, taken eleven years earlier, to reject the proposal?

Was that power terminated, twelve years earlier, by the contemporaneous rejection of the proposal by more than one-fourth of the States?

Had that power expired, before ratification was attempted, because the proposal, made almost thirteen years earlier, was then no longer pending before the States or, to use Judge Jameson's expression, quoted with approval in the opinion of this Court in *Dillon* v. *Gloss*,* because the proposal, in such circumstances,

*256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994.

"ought to be regarded as waived, and not again to be voted upon unless a second time proposed by Congress"?

The court below answered each of these questions in the affirmative, upon grounds ably and, we think, convincingly stated in its unanimous opinion. There were no judicial precedents upon these exact questions, although there were implications in the *Dillon Case*, which seemed to point the way. As we shall attempt to show, even political precedents were lacking. The questions were therefore, of first impression and it was necessary to rely upon the phrasing of Article V, as construed by this Court, upon such inferences as might reasonably be drawn therefrom, with such aid as might be found in the purpose and history of that Article, in academic discussions by commentators on the Constitution and in occasional statements by public men.†

While each of the grounds upon which the court below based its decision, considered separately, is, we submit, sufficient to sustain the judgment, we think those grounds are not unrelated but that all of them, for like reasons, are implied in the ratification provisions of Article V.

It was no doubt contemplated by the members of the Federal Convention that decisive action by the States upon a Congressional proposal for amendment

†The great and increasing interest in the process of amending the Constitution during the past two or three decades is attested by the voluminous literature on the subject, to be found chiefly in legal periodicals. We have prepared a list of such writings of this kind as have come to our notice and have printed it as an appendix to this brief (Appendix E). They disclose a great diversity of views on sundry points. As to the grounds of the decision below, they have, we think, a clear tendency to support them.

would be the shortest stage in the whole process of amendment, and certainly this has been true historically. First, there would arise some controversy or agitation with respect to social, political or economic conditions, which would sooner or later result in the suggestion that an amendment of the Constitution was called for. This is the stage of propaganda and prolonged public discussion.

The second stage has its scene in the Houses of Congress, where a campaign is waged for the proposal of the desired amendment. Active propagandists and skilled agitators appear upon the scene. Usually, the campaign must be renewed in many successive Congresses, before the desired end has been attained. Public hearings before the committees of both Houses are had. Deliberations of the committees themselves, debates in both Houses upon the reports of the committees, all take time. And this debate has not always been confined to the Houses of Congress. Not infrequently the press, the platform and sometimes the pulpit have continued their contributions to the discussion. It is said that in the century and a half since the adoption of the first ten Amendments (Bill of Rights), 3,105 amendments have been offered in Congress, that of these only 16 have found enough support to secure their submission to the States and that of those 16 only 11 have been adopted.*

The third and final stage in the process of amendment is the action of the States upon the Congressional

*Garrett, "Amending the Federal Constitution," 7 Tenn. Law Review, 300.

proposal. As was to be expected, this has proved to be the shortest stage of all. The average time taken for the adoption of the last eleven Amendments of the Constitution has been one year, six months and thirteen days.* The last five Amendments, Seventeenth to Twenty-first, inclusive (1913-1933), were adopted in the average time of twelve months and ten days.

We exclude from our computation the five proposals which have failed of adoption. The latest of these is the proposal of the Child Labor Amendment, which is now well on in its fifteenth year. The next older proposal that has failed of adoption is the so-called Corwin Amendment which it was hoped might prevent the Civil War. Surely, it will not be contended that this proposal and the earlier three which failed of adoption are still pending.

We respectfully submit that it may be assumed that the men who framed and ratified the Federal Constitution anticipated that every suggestion for its amendment, before submission to the States for their action, would pass through the stages above described, that the mere fact of the submission of a proposal for amendment by Congress in itself would indicate that it had received long prior discussion and that consequently prompt action by the States on the proposal was anticipated and intended. Certainly, promptness

---

*Eleventh: 3 yrs., 3 mos., 24 days
Twelfth: 9 mos., 13 days
Thirteenth: 10 mos., 18 days
Fourteenth: 2 yrs., 1 mo., 15 days
Fifteenth: 1 yr., 1 mo., 3 days
Sixteenth: 3 yrs., 6 mos., 25 days
Seventeenth: 1 yr., 16 days
Eighteenth: 1 yr., 1 mo., 10 days
Nineteenth: 1 yr., 2 mos., 21 days
Twentieth: 11 mos., 3 days
Twenty-first: 9 mos., 15 days

Average time: 1 yr., 6 mos., 13 days.

of action characterized the ratification of the Constitution itself. Only eight months and twenty-four days elapsed between September 28, 1787, when the Congress of the Confederation ordered the report of the Federal Convention to be transmitted to the legislatures of the States, and June 21, 1788, when the ninth ratification took place which brought the Constitution into effect. In that short interval of time, the draft of a new Constitution was transmitted to the legislature of each State, the legislature of each State adopted an act or resolution calling a delegate convention, the delegates to each of those conventions were elected and assembled and, in many States, entered upon a prolonged and somewhat violent debate as to "conditional" ratifications, as to "previous" or "subsequent" amendments and as to other disputed matters, so familiar to the student of those times.

This Court, in the *Dillon Case,* interpreted Article V as requiring that amendments, when proposed, be considered and disposed of presently. We submit that it is consonant with this interpretation to conclude that the first affirmative action taken by a State is final and that upon the "roll call of the States", both "yeas" and 'nays", are to be counted and the result determined in accordance therewith.

We now turn from these observations of a general nature to a more careful consideration of the grounds of the decision below.

I.

STATE ACTION UPON A PROPOSED AMENDMENT EXHAUSTS THE POWER INVOKED BY THE PROPOSAL OF THE AMENDMENT.

That State action upon a proposed amendment is intrinsically the same, whether taken by legislatures or by conventions will hardly be disputed:

> "If an amendment to the Federal Constitution should be proposed by Congress, and submitted to State Conventions instead of to the legislatures, the powers and disabilities of the two classes of bodies in respect to the amendment would, it is conceived, be precisely the same."*
>
> "Conventions, like legislatures, are mere agents of the people. . . . The ratifying process is equivalent to a roll-call of the States."†

In *Dillon* v. *Gloss, supra*, this Court, referring to the two methods of ratification authorized by Article V, said:

> "The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that the ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all."

---

*Jameson, "A Treatise on Constitutional Conventions," 4th ed., §586.

†Prof. Lester B. Orfield, "Federal Amending Power," 25 Ill. Law Review, 418.

In *Hawke* v. *Smith*,‡ this Court, speaking on the same subject, said:

> "Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people."

In the growing literature on this subject, no writer has been bold enough to take or defend the position that the delegates to a State convention, who had been elected and assembled for the single purpose of acting upon a proposed amendment to the Federal Constitution and who, after adopting a resolution rejecting the proposal, had adjourned *sine die*, could thereafter (eleven years thereafter, let us say) reassemble, reopen the subject and adopt a resolution of ratification.

The functional identity of State legislatures and State conventions, when called upon to speak for the people of the States under Article V of the Federal Constitution, is further shown by the well established doctrine that a State legislature, when so acting, is not exercising ordinary law-making powers but is performing a Federal function, in consequence of which a resolution of ratification is not subject to the veto of the Governor of that State nor to the initiative and referendum provisions of the State constitution:

Leser v. *Garnett, supra;*
Hawke v. *Smith, supra;*
Rhode Island v. *Palmer* (National Prohibition Cases), 253 U. S. 350, 64 L. Ed. 946.

‡253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 871.

Mr. Justice Day, writing the opinion of the Court in *Hawke* v. *Smith,* said:

> "Ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment."

Mr. Justice Van Devanter, writing the opinion of the Court in *Rhode Island* v. *Palmer,* said:

> "The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification *or rejection* of amendments to it." (Italics ours.)

A State legislature, therefore, when acting pursuant to Article V, is acting as a representative body to express the will of the people of the State. It is, as was said in *Dillon* v. *Gloss, supra,* a "representative assembly", whose action constitutes "a decisive expression of the people's will". It is a sort of ready-made convention and its function and power is exactly the same as those of a convention specially constituted for the purpose of acting upon a proposed amendment. As was said by Judge Jameson, "the powers and disabilities of the two classes of bodies in respect to the amendment would, it is conceived, be precisely the same."

In view of the inevitable stages in the process of amendment, to which we have alluded, it seems to us

to be a sound and natural construction of Article V that, when a State, whether by legislature or convention, has taken affirmative action upon a proposal for amendment, its decision is final, its power so to act is exhausted and it cannot take any further action upon the proposal, unless there is a new submission of the question by Congress. But the public excitement and partisan passion aroused by the conflict over the "reconstruction" of the governments of the seceding States after the Civil War gave birth to a contrary view,—a view which we think finds no justification in the language of Article V and which contains within itself an inconsistency that was countenanced only because it suited the exigencies of the policy of the Radical Republicans of the North. That view was that a state legislature, in voicing the will of the people on a proposal for the amendment of the Federal Constitution, is bound by its first action, if it is a ratification of the proposal, but is not bound by its first action, if it is a rejection of the proposal.

So far as we know, the first expression of this view came from Thomas E. Bramlette, a Civil War Governor of Kentucky, who was elected to that office while serving as a Major General in the Union Army. In 1865, the Thirteenth Amendment, abolishing slavery, was proposed by Congress and was promptly adopted. The Kentucky legislature, however, rejected that proposal and requested the Governor to forward copies of its resolution to the President of the United States, the President of the Senate and the Speaker of the

House of Representatives. Governor Bramlette responded with a message in which he declared his purpose to comply with the request to forward the resolution to Washington, but took occasion to express his strong disapprobation of the action of the legislature and in that connection said:

> "Rejection by the present Legislative Assembly only remits the question to the people and the succeeding Legislature. Rejection no more precludes future ratification than refusal to adopt any other measure would preclude the action of your successors. 'When ratified by the Legislatures of three-fourths of the several States', the question will be finally withdrawn, and not before. Until 'ratified', it will remain an open question for the ratification of 'the Legislatures of the several States.' 'When ratified' by the Legislature of a State, it will be final as to such State; and 'when ratified by the Legislatures of three-fourths of the several States', will be final as to all. Nothing but ratification forecloses the right of action. 'When ratified', all power is expended. Until 'ratified', the right to ratify remains."*

The outcome of the War made the adoption of the Thirteenth Amendment a foregone conclusion and no question has ever arisen as to its validity, but since Governor Bramlette's view has been adopted by Judge Jameson and other commentators, we would point out that it was based upon a supposed analogy to the ordinary course of legislation. He said that rejection

*Kentucky Session Acts, 1865, p. 157.
Bodley and Wilson, "History of Kentucky," Vol. II, p. 281.

of an Amendment no more precluded its future ratification "than refusal to adopt any other measure would preclude the action of your successors". In view of the repeated decisions* of this Court that a state legislature, in acting upon a proposed amendment, is not engaged in legislation but is performing the function of a representative assembly, called upon to voice the will of the people upon the proposal, the analogy suggested by Governor Bramlette cannot be accepted.

It is, however, the proceedings in connection with the Fourteenth Amendment that are chiefly relied upon by those commentators who have adopted Governor Bramlette's view. That Amendment was proposed in June, 1866, and, as we have seen, required more than two years for adoption. It was generally apprehended that the first section of the Amendment, declaring that all persons born or naturalized in the United States and subject to the jurisdiction thereof were citizens of the United States and of the State wherein they resided, and forbidding the States to make or enforce laws which should abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, was intended to give, or at least would have the effect of giving, the right of suffrage to the freedmen. For this reason, there was strong opposition to it, not only in the South,

Leser v. *Garnett*, *supra*;
Hawke v. *Smith*, *supra*;
National Prohibition Cases, *supra*.

but in the North. At that time there existed in many of the Southern States civil governments which had been set up with Lincoln's approval, in accordance not only with his amnesty proclamation, but with the theory to which he had adhered throughout the contest that the seceding States had never been out of the Union. The legislatures of eight of those States, Virginia, Louisiana, Tennessee, Arkansas, South Carolina, North Carolina, Alabama and Georgia, had ratified the Thirteenth Amendment and had been named in Secretary Seward's proclamation of the adoption of that Amendment on December 18, 1865.*

But two of them, North Carolina and South Carolina, rejected the Fourteenth Amendment and the others, except Tennessee which ratified, failed to ratify. Meanwhile, the tragic blunders of Reconstruction were in process of incubation and, after the death of President Lincoln, the Radical Republicans in Congress secured the passage of the first and second Reconstruction Acts (March, 1867), both over the vetoes of President Johnson. The first of these Acts recited that "no legal state government or adequate protection for life or property now exists in the rebel states of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas and Arkansas". The territory embraced within those States was divided into "Military Districts", each of which was put under the superintendence and control of a major-general. The whole matter of Reconstruction was taken over by Congress, which had

*"Documentary History of the Constitution," Vol. II, p. 636.

strongly resented Lincoln's assumption that this was the business of the Executive Department of the Government.

Thus were the "carpet bag" governments ushered in and it was by such governments in the States of Arkansas, Florida, North Carolina, South Carolina, Louisiana and Alabama that the Fourteenth Amendment was finally ratified. Meanwhile, the legislatures of Ohio and New Jersey, which had first ratified the Amendment, adopted resolutions withdrawing their consent. It was in this extraordinary situation that Secretary Seward, on July 20, 1868, issued his first proclamation with reference to the Fourteenth Amendment. He first pointed out, not only that New Jersey and Ohio had attempted to withdraw their ratifications, but also that in Arkansas, Florida, North Carolina, Louisiana, South Carolina and Alabama, resolutions of ratification had been adopted "by newly constituted and newly established bodies avowing themselves to be, and acting as the Legislatures respectively of" those States. He said that it was "deemed a matter of doubt and uncertainty" whether the later resolutions of Ohio and New Jersey were "not irregular, invalid and therefore ineffectual for withdrawing the consent of the said two States". His proclamation then continued thus:

> "And whereas the twenty-three States first hereinbefore named, whose legislatures have ratified the said proposed amendment, and the six States next thereafter named, as having ratified the said proposed amendment by newly constituted

and established legislative bodies, together constitute three-fourths of the whole number of States in the United States;

"Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the Act of Congress approved the twentieth of April, eighteen hundred and eighteen hereinbefore cited, do hereby certify that, if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned and so has become valid to all intents and purposes as a part of the Constitution of the United States."

Upon the submission of this inconclusive proclamation to Congress, that body, on the following day, July 21, 1868, declared that the Amendment had been adopted and directed the Secretary of State to "promulgate" it as a part of the Constitution. Georgia had, on that very day, withdrawn her former rejection and ratified and Secretary Seward included that State in his second proclamation of July 28, 1868.*

At the time of these happenings, there were thirty-seven States in the Union, so that ratifications by twenty-eight of them were required for adoption of the Amendment. There were twenty-five ratifications

*"Documentary History of the Constitution," Vol. II, pp. 873, 893.

about which there was no question. Three more were needed. Ohio and New Jersey had ratified and subsequently rejected. North Carolina and South Carolina had ratified, through their "carpet bag" legislatures, after having rejected the Amendment through legislatures elected in the manner authorized by Lincoln. If these four States, as well as Georgia which had ratified before Seward's second proclamation, were all counted as ratifying, there were thirty ratifications, or two more than were required for adoption. Congress resolved all doubts in favor of adoption. States that had ratified and then rejected and States that had rejected and then ratified were all counted as ratifying.

What conclusions are to be drawn from this unhappy history? What lesson has it for the student of constitutional law? It was in this tense atmosphere that Judge Jameson wrote his book† and it was from this non-judicial precedent that, in later editions, he drew the extraordinary conclusion that consent to an amendment once given, no matter how hastily and inconsiderately, is irrevocable but that its rejection, no matter how deliberate or how often repeated, may at any time be overridden, even under circumstances (as in the present case) which excluded all opportunity for hearing or deliberation. Upon this theory, a proposal for amending the Federal Constitution can never be *defeated*, since votes of rejection, though affirmative in form and buttressed with statements of the reasons for rejection, are treated as no votes at all, hav-

†Jameson, "The Constitutional Convention," 1st ed., 1867.

ing no more effect than complete inaction on the part of the rejecting State.*

Although Governor Bramlette preceded him, it was Judge Jameson who gave wide currency to this view. In his first edition, he had said that, "although the subject [was] not free from difficulties," it was "probable" that Governor Bramlette's view would be accepted as the true construction of Article V.

The incidents attending the adoption of the Fourteenth Amendment had not then taken place and the only reason he gave for adopting Governor Bramlette's opinion was that the failure to mention rejections in Article V "could hardly have been unintentional" and that consequently "it would seem a stretch of power to interpolate into that Article that, if rejected by one legislature or by three-fourths or even all State legislatures, such action should be taken to be definitive".

We think Judge Jameson did not improve upon Governor Bramlette's argument. He employed against his own thesis the controversial stratagem of the *reductio ad absurdum*. Did he really mean to be taken literally when he said that, even though all of the States rejected a proposal for amendment, there would be no decision of the question and the matter would stand just as if no action had been taken at all?

So far as concerns the precedent set by Congress in connection with the adoption of the Fourteenth

*Jameson, "Constitutional Conventions," 4th ed., §579; Orfield, "Federal Amending Power," 25 Ill. Law Review, 418.

Amendment, we admit the propriety of its action in counting the votes of New Jersey and Ohio, since this accords with our contention that a State which has once acted upon the question of ratifying an amendment has exhausted its power and cannot thereafter reverse its action. As to the counting of the votes of Georgia and the two Carolinas, the avowed justification for this was, not that those States could ratify despite their previous rejections, but that their previous rejections were void because the then governments of those States were illegal and their legislatures were without authority to act upon the amendment at all. It is thus seen that this celebrated episode, so often cited as a precedent for the right of a State to ratify after having once rejected, has no validity even as a political precedent.

After the adoption of the Fourteenth and Fifteenth Amendments, Judge Jameson revised and enlarged this part of his book* and leaned heavily on the transactions connected with the adoption of the Fourteenth Amendment to support the view expressed in his first edition. He admits that "it would be puerile to contend that a right to pass upon a proposition does not involve a right either to reject or to ratify it,"† but he immediately undertakes to whittle away the right of rejection by an argument which seems to us very technical and "legalistic" and which brings him, at last, to the conclusion that rejections are allowed but are to be given no effect.

*Op. cit. *supra*, 4th ed. (1887), §§578-586.

†§581.

We have given prominence to Judge Jameson's exposition of this subject because his conclusion has been accepted by many later commentators, without adding anything to the argument supporting it. His followers, like Judge Jameson himself, seem to leave out of consideration the substance and purpose of Article V and to engage in a sort of legal logomachy. They seem to forget that the purpose of referring a proposed amendment to the State legislatures was to ascertain the will of the people through the action of those bodies. They seem to overlook the fact that "both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people."* They seem to say that the action of one of those deliberative assemblies does not voice the will of the people, if the proposal is rejected. In short, the spell of the mythical precedent of the War Amendments seems to blind them to the realities of Article V. Was it not said that Dr. Johnson believed in the Cock Lane ghost but did not believe in the Eisbon earthquake?

Is it an unwarranted "stretch of power" to conclude that rejection by "all state legislatures" (to adopt Judge Jameson's own hypothesis) "should be taken to be definitive"? Why refer the question to the States at all, for "ratification or rejection,"† if, as in the latter-day plebiscites in Russia and Italy and

Hawke v. *Smith*, *supra*.
†*National Prohibition Cases*, *supra*.

Germany and Austria, only a decision one way is to be accepted?

The only unusual incident attending the adoption of the Fifteenth Amendment was the attempted withdrawal by New York of its earlier ratification. The proclamation of the adoption of the Amendment, by Hamilton Fish, Secretary of State,* named thirty States as having ratified and recited that New York, having first ratified, "claimed" to have withdrawn its consent. Without New York, there were ratifications from one more than three-fourths of the States and the question of the effect of New York's attempted withdrawal was therefore moot.

But it was the subject of a debate in the United States Senate in which Senator Garrett Davis, of Kentucky, spoke upon the question we have here. Davis had taken a prominent part in the public life of Kentucky for many years and was a member of the United States Senate from December 23, 1861, until his death on September 22, 1872. In opening his speech, he stated the position which he was about to defend:†

> "I agree—at least such is my conviction—that when any State by its Legislature has voted to adopt a proposed amendment to the Constitution it is no longer within the competence or power of that State to withdraw its ratification. But on the other hand, I say that there is an implied power which is correlative and coextensive with the power to ratify a proposed amendment and that is a power to reject any proposed amendments. I

*"Doc. Hist. of Const. U..S.," Vol. II, p. 893.
†Congressional Record, 41st Cong., 2nd Session, pp. 1479-1480.

admit that this is an implied power; but it is one that exists as unquestionably as the express power to ratify, in my judgment."

He expressed the opinion that it would have been wiser for Congress to have referred the question to State conventions instead of to State legislatures, and then continued:

"But I will hasten on, Mr. President. Now, this is the main proposition to which I was coming. The same thing exactly is submitted to a State Legislature or to a convention of the State. The two tribunals of the State, whether it be a legisture or a convention, have precisely the same power. The convention would have as much as a Legislature; a Legislature as much power over the subject as a convention; and neither would have any more power over the subject of a proposed amendment than the other would have—not one iota. * * *

"And here I take now my further position; that before each body the power would not only be of the same extent, but it would be exactly of the same continuance and duration. That, Mr. President, is an important proposition. It involves an important principle; it is the hinge upon which this question, in my judgment, turns. And what is the duration of the power? The Legislature acts until it has ratified; if it does not ratify the power continues until it acts to reject. The power to reject is in all respects parallel to the power to ratify. It is one of equal size, of equal force, of equal duration. It is the correlative, by necessary implication, of the power to ratify; and when the

act of rejection has taken place the power, the whole power, is then exhausted—as much exhausted as it would have been by a ratification by the same Legislature.

"Let us apply this argument to a convention of a State called to consider a ratification. . . . Now, suppose that in each State you had a convention organized and that convention had met to consider, say, the fifteenth amendment; conventions in all the States had been summoned in obedience to the legislation or resolutions of Congress to pass upon the fifteenth amendment, whether it should be ratified or rejected; those conventions got together, charged, as they might have been, especially with this isolated, particular, and constitutional power of acting upon the proposed amendment, and passed upon it and rejected it, and the conventions then adjourned (*sine die*) and went home, could anything be more unsound, anything more monstrously absurd, than that such a convention might be re-convened for the purpose of withdrawing its action of rejection of the proposed amendment and ratifying it? Sir, for any convention to have acted upon the subject in that form would have required special and particular language in the Constitution to authorize it.

"I agree with the honorable Senator from New York that this power is special; it is extraordinary; it does not appertain to the legislative powers of the States. So, too, the power to propose constitutional amendments does not appertain to the legislative powers of Congress. They are particular, extraordinary powers, made for a special and an isolated case. They are to be construed

strictly; and when they are executed they are powers that are gone forever, because their function has been exercised."

. . . . . .

"The honorable Senator's argument upon the first branch of his proposition I thought powerful and conclusive; but when he contended that this power of a State to act upon a proposed amendment to the Federal Constitution was a power to ratify, and imported no power to reject, I think he was widely from the true principle and widely from logic. How shall it be before a Legislature that has rejected it? How long shall it be an open question? Twenty years? Fifty years? How long? Where is there any principle or provision of the Constitution that would so protract the question before a State convention or State Legislature acting upon the subject of a proposed amendment? There is none. There is not a syllable of language from which such a power can be inferred. It does not exist. When the subject is submitted to a State for its action, it is but for one action. The action of acceptance is no more extensive than the action of rejection; it has no more validity or effect. The effect of either mode of action is to exhaust the power of the State over that proposed amendment, and it can never come before that State again in any form whatever unless it comes before it in the form of a new proposition to amend the Constitution."

This is the speech of a man who has considered his subject, has reached a reasoned conclusion and knows how to state it clearly and forcefully. It will be noted in how many particulars Senator Davis anticipated

the later decisions of this Court in construing Article V,—the non-legislative nature of the power of Congress to propose amendments and of state legislatures to take action upon them, the special character and constitutional origin of these powers, the functional identity of state legislatures and conventions, the limitation of the time for adoption.

Neither Judge Jameson nor any of his disciples, so far as we know, has ever taken up the challenge of Senator Davis by defending the position that a state convention, called to act upon a proposed amendment, could, after rejecting the proposal and adjourning *sine die*, reassemble at some future time and reverse its action. We think that the history and character of the Constitution excludes the supposition that such a policy of vacillation and procrastination was contemplated by the framers of Article V or that they would ever have countenanced it, had it been suggested. Judge Jameson himself, though conceding that "the powers and *disabilities*" of state legislatures and conventions, in respect to amendments, were "precisely the same", was not willing to say that a convention, like a legislature, might ratify after rejection.

In the fourth edition of his book he employed Governor Bramlette's analogy to the power of a legislature to repeal previous legislation (an analogy which he had ignored in his first edition) to bolster his assertion of the right *of a legislature* to ratify after rejection,* and both Mr. David K. Watson† and Mr.

*Jameson, "Const. Conventions," 4th ed., §581.

†"Constitution of the United States," Vol. II, p. 1318 (1920).

W. F. Dodd‡ (the latter with hesitation) have followed his lead.

But this analogy, though clearly inadmissible, would equally sustain the power of a legislature (or convention) to reject after ratification, a construction which has few, if any, supporters.

We submit that Senator Davis has the best of the argument. His interpretation, not only accords with the express terms of Article V, but precludes uncertainty as to the status of a proposal for amendment and discourages vacillation and procrastination in coming to a decision.

II.

THE PROPOSAL WAS DEFEATED IN 1925, UPON THE THIRTEENTH AFFIRMATIVE REJECTION.

By the end of the year 1925 the question of the ratification of the Amendment had been taken under consideration by the legislatures of thirty-nine States. The proposal had been assented to by four States, had been affirmatively rejected by both Houses of the legislatures in twenty-two States and by one House in nine additional States. In four States it had been negatived by adverse action of one or both houses of the legislatures on motion to ratify. The vote was, therefore, "Ayes" four, "Nays" thirty-five. It had been ignored in nine States, despite an active campaign for ratification on the part of the well organized

‡"Amending the Federal Constitution," XXX Yale Law Journal, 322.

group which had induced Congress to make the proposal.

Certainly, there can be no doubt that, at that time, the overwhelming sentiment of the country was opposed to the proposed grant of power to Congress. And that sentiment remained unchanged throughout the following seven years, or to the end of 1932, for during that time only five States acted on the Amendment, two ratifying and three affirmatively rejecting. During the calendar year 1932 the proposal had been completely ignored.

But, for the present, we take into account only the affirmative rejections of the proposal, of which there were thirty-one at the end of 1925 and thirty-four at the end of 1927. It is obvious that, if an affirmative rejection by a State is final and irrevocable, then the proposal was dead in 1925, since an irrevocable commitment of more than one-fourth of the States against the proposal would exclude the possibility of its approval by the required three-fourths.

But even if it be assumed, for the sake of the argument, that a State may change its position at any time before a decision has been reached, it does not follow that it may do so afterwards. Article V itself establishes this rule in cases where the decision is in favor of the proposal by declaring that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the States, thus closing the question at that time.

The question then is whether there can ever be an adverse "decision" upon such a proposal? Is it rea-

sonable to suppose that the authors of Article V intended that a question proposed for decision could be decided in only one way? Was it their intention that a proposal for amendment, despite storms of hostile opinion, should be condemned, like the "Flying Dutchman", to drift about the political seas forever?

We think that the very nature of the transaction requires a negative answer to this question and in support of this view we quote from an article by Mr. Frank W. Grinnell, of the Boston bar.* He says:

> "In the very recent unanimous opinion by Chief Justice Hughes in U. S. v. Chambers and Gibson, decided February 5, 1934, the court took 'judicial notice of the fact that the ratification of the twenty-first amendment which repealed the eighteenth amendment was consummated on December 5, 1933', and they cited the case of Dillon v. Gloss, 255 U. S. 368. December 5th was the date on which the thirty-sixth state voted to ratify.
>
> "Since the constitution requires a vote of three-fourths of the several states to ratify an amendment, it requires only one state more than one-fourth to defeat ratification and it seems to follow as a matter of common sense and orderly procedure from the decision just referred to that the rule must work both ways and that when thirteen states (one more than one-fourth of the forty-eight states) have voted not to ratify an amendment it is no longer pending, but is defeated until Congress sees fit to resubmit it. . . . If this is not so, states might be subjected to constant agitations over defeated amendments after the citi-

*"A 'Point of Order' on the 'Child Control' Amendment," Am. Bar Asso. Journal, July, 1934; reprinted in Mass. Law Quarterly, Aug., 1934.

zens considered them defeated and were off their guard."

If Article V had provided that only a majority vote of the States should be necessary for the adoption of an amendment, we suppose there would have been no question of the power of a majority to defeat such a proposal by votes of rejection. It would not then have been claimed, we surmise, that there should be a *locus poenitentiae* for members of the majority. The popular sentiment of the rightness of majority rule would doubtless have prevailed and there would have been a general acquiescence in the decision.

But the impotence of a majority to have its way might seem like a sort of minority rule. That situation had not arisen in the case of the Child Labor Amendment at the time when this suit was commenced but it had arisen in the case of the Fourteenth Amendment and it may be that the resentment of the dominant faction in Congress against the obstruction of their passionately cherished plans by a minority of the States was the soil in which the Bramlette-Jameson idea germinated.

It is well understood what important considerations induced the framers of the Constitution to require that changes in it should not be made unless they were supported by a greatly preponderant public conviction of their desirability. The philosophy of that requirement was thus expressed by President Hadley of Yale:*

*Arthur Twining Hadley, "Standards of Public Morality."

"Not content with saying that all just government is based on the consent of the governed, the enthusiastic advocates of democracy hold that if you could only find what a majority of the governed wanted you could easily incorporate it into law. Never was there a greater practical error. Public law, to be effective, requires much more than the majority to support it. It requires general acquiescence."

The point under consideration is admirably stated in the following excerpt from an article* by Mr. Thomas F. Cadwalader, of Baltimore:

"As to the finality of thirteen actual rejections by legislatures capable of acting there should be little difference of opinion. Any other rule would subject every one of the dissident states to a weight of political pressure entirely out of harmony with the principle that law is legitimately made and constitutions are legitimately altered only by the voluntary concurrence of the law-making or amending bodies. If we are willing to stand by the principle that the action of three-fourths of the states is necessary to amend the federal compact we must concede to a dissident minority that may only barely exceed one-fourth the right to their opinion, free from any external pressure amounting to force, fear, calumny or corruption. The majority need not rely on these things. By hypothesis they control two-thirds of Congress and nearly three-fourths of the states. It is easily in their power to resubmit any amendment as often

*"Amendment of the Federal Constitution," LX Am. Law Review, 389.

as they may please. The minority can only insist that in view of their dissent the matter be again submitted by the Congress to all the states. It is similar to the case of a treaty rejected by more than one-third of the Senate, to a bill defeated by a small majority in one house and passed overwhelmingly by the other, or, to take an even more familiar example, the failure of a jury to agree on a verdict. Even the Parliament Act, which is said to have reduced the House of Lords to impotence, left them with the power to compel the re-enactment by the Commons of any bill they might reject."

In concluding our argument on this point, we suggest that, in the academic discussion of this subject, there has been an unjustified pother over the meaning of the plain language of Article V as to the point in question. The sense of the people of the States was to be taken on proposals for amending the Constitution. This was to be accomplished by the submission of such a proposal to representative assemblies in the States. The decision of the States was to control. Ratifications had to be mentioned because it was necessary to state the requirement that, in order to accomplish the adoption of the proposal, ratifications by three-fourths of the States must be secured. The omission to mention rejections seems to us to have no significance. The right to reject was clearly implied. To deny it, Judge Jameson said, would be "puerile."

The requirement of the consent of three-fourths of the States for the adoption of an amendment was per-

haps the most important of the checks provided against hasty and ill-considered action. It was intended to make sure that only such changes are made as are supported by heavily preponderant public opinion. It provides a plan for obtaining a contemporaneous expression of opinion. If a proposal is defeated even by a minority of the States, the purpose of the Article is served.

III.

THE PROPOSAL WAS NOT PENDING BEFORE THE STATES IN JANUARY, 1937, WHEN THE KENTUCKY LEGISLATURE ATTEMPTED TO RATIFY.

The point we make here is that, when the Kentucky legislature attempted to ratify the Child Labor Amendment, the proposal had been so long before the States without adoption that it must be considered as being no longer open to ratification and that consequently the power of a State legislature to act on the proposal had expired. Upon this point we are able to quote Judge Jameson as giving some support to our position. In his fourth edition, in speaking of the power of ratification, he said;*

> "The better opinion would seem to be that an alteration of the Constitution proposed today *has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to*

*Op. cit., *supra*, §585.

be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress."

. . . . . .

"We discuss this question here merely to emphasize the dangers involved in the Constitution as it stands, and to show the necessity of legislation to make certain those points upon which doubts may arise in the employment of the constitutional process for amending the fundamental law of the nation. *A constitutional statute of limitation, prescribing the time within which proposed amendments shall be adopted or be treated as waived, ought by all means to be passed."* (All italics ours.)

When the proposal of the Eighteenth Amendment was under consideration in Congress, it was suggested that a time be fixed when the proposal should be considered as defeated, if it were not sooner ratified by the requisite number of States. The first proposal was that a limitation of six years should be adopted. Thereupon, the persons engaged in the manufacture of alcoholic beverages requested that the amendment be so drawn as to make it effective one year after its adoption, in order that they might have a reasonable time for adjustment after it was certain that their business must be wound up. This was agreed to and that proposal provided that the amendment should not become effective until one year after adoption.* The proponents of the Amendment then urged that, since the "liquor interest" was to have one year for winding up

*Dillon v. Gloss, supra.

in the event of the adoption of the Amendment, they ought to have another year in which to conduct their campaign for adoption and, while there seemed to be no logical connection between the two things, both suggestions were agreed to and the time allowed for adoption was fixed at seven years instead of six.†

After the proposal of the Eighteenth Amendment a resolution was offered in the Senate for the proposal of another Amendment, fixing six years as the time in which all amendments must be adopted. It was favorably reported by the committee to which it had been referred but appears to have been abandoned, possibly because of the decision in *Dillon* v. *Gloss,* which came about a year later.

In that case, the validity of the Eighteenth Amendment was challenged upon the ground that the limitation of the time for adoption was beyond the power of the Congress and that consequently the proposal, and necessarily all steps taken pursuant thereto, were void. In discussing this subject this Court made the following important statement:

> "We do not find anything in the Article which suggests that an amendment, once proposed, is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being

†Cong. Rec. 65th Cong., 1st Sess. 5648-5653, 5658-5661; 2nd Sess. 423-446, 463-478.

that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in the three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which, of course, ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson 'that an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810-and one in 1861— are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or im-

plication from Article 5 is that the ratification must be within some reasonable time after the proposal."

"Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

In addition to the authority of this case, we have, in the Congressional debates of recent years, evidence of a strong, if not prevailing, opinion among members of Congress that seven, or even six, years would be a long enough time to allow for the adoption of an amendment. Since the decision in *Dillon* v. *Gloss,* two proposals for amending the Constitution (since adopted as the Twentieth and Twenty-first Amendments) each contained a limitation of seven years. And it will be noted that no distinction, with regard to a time limit for adoption, has been made between ratifications by

legislatures and ratification by conventions, the latter method having been adopted, for the first time, in the case of the Twenty-first Amendment.

The validity of the limitation provided in the proposal of the Eighteenth Amendment was upheld in the *Dillon Case*. The validity of similar limitations in the proposals of the Twentieth and Twenty-first Amendments has never been called in question, although other aspects of the Twenty-first Amendment were under consideration in *United States* v. *Chambers*, 291 U. S. 217, 54 S. Ct. 434, 78 L. Ed. 763, 89 A. L. R. 1510.

A period of twenty years has now elapsed since the proposal of the Eighteenth Amendment, in which for the first time the seven-year limitation was introduced. The question of fixing a maximum time for adoption of a proposal for amendment had been debated in Congress before that time. In all of the debate on this subject, six or seven years had been the limitation usually suggested. Thus, for some years before this Court spoke in the *Dillon Case*, Congress itself had given indications of a belief that Article V contemplated that the adoption of an amendment should follow within a comparatively short time after its proposal and in the proposal of the Eighteenth Amendment it had acted upon that belief. After the Court had approved its action, in *Dillon* v. *Gloss*, Congress, in the instances of the Twentieth and Twenty-first Amendments, followed the course which the Court had approved.

DILLON v. GLOSS, REVIEWED.

The significance of the decision in the *Dillon Case* has been the subject of much discussion and some controversy among the professorial Pundits of the law. Within a few months of the handing down of that decision Professor Freund tilted a lance at the Court, barbed with the accusation that it had "decided a case that was not before it" and had "discussed and established a purely academic proposition".* This accusation was based upon the supposition that the Court had overlooked the fact that the seven-year limitation in the proposal of the Eighteenth Amendment was not a part of the Congressional resolution but was part of the Amendment itself. This differentiation has always seemed to us somewhat illusory. Congress undoubtedly proposed the Amendment and, if the limitation was part of the Amendment, then Congress proposed the limitation. This was what Dillon complained of, claiming that Congress had no power to make a proposal in that form. Whether or not Congress had that power was the question which this Court considered and determined. Although there are still some echoes of Professor Freund's challenge,† an abandonment of the point is suggested in the concluding paragraph of his article:

---

*Ernst Freund, "The Prohibition Amendment and Consent Requirements and Time Limits," 7 Am. Bar Asso. Journal, 656 (Dec., 1921).

†See "The Child Labor Amendment and the Amending Process," LXXII United States Law Review, p. 162 (Mar., 1938).
Lester B. Orfield, "Reform of the Federal Amending Power," X, No. Carolina Law Review, p. 24 (Dec., 1931).

"But a future Congress will be justified in relying upon the decision, and the practice of attaching time limits to submit resolutions may come to be adopted."

It has been pointed out, and it is, of course, true, that the facts of the *Dillon Case* were very different from the facts of this case. In the proposal of the Prohibition Amendment. Congress had adopted a time limit, whereas it did not do so in the proposal of the Child Labor Amendment. But there remains the question how much this difference affects the pertinence of the doctrine of the *Dillon Case* to this case.

In the *Dillon Case* the Court did not hold, as we read its opinion, that Congress had the power, *sponte suâ*, to adopt the policy of limiting the time within which a proposal for amendment may be adopted. It held that that policy was embodied in Article V itself. The only power which it conceded to Congress was that of aiding the enforcement of the requirement of Article V that adoption follow proposal within a reasonable time by fixing a definite time for that purpose.

Not only the statements found in the opinion but its arrangement are to be noticed. After a reference to the four proposals for amendment of the Constitution which had never been adopted as showing "the circumstances in the light of which Congress, in proposing the 18th Amendment, fixed seven years as the period for ratification", the Court said:

"Whether this could be done was questioned at the time and debated at length, but the prevail-

ing view in both Houses was that some limitation was intended and that seven years was a reasonable time."

The Court then summarized the provisions of Article V and, having noted certain indications of intention found in that Article, said:

> "We conclude that the fair inference or implication from Article 5 is that the ratification must be within some reasonable time after the proposal."

Up to this point in its exposition of the subject, the Court had made no reference to any power in Congress to limit the time for ratification of a proposed amendment. It had confined itself to a construction of Article V and had reached the conclusion stated above, to-wit, that the requirement of adoption of an amendment within a reasonable time after its proposal was implied in that Article. Having established that foundation, it proceeded to examine the question whether Congress had the power to aid the enforcement of this implied limitation by fixing a definite period for adoption of the proposal. After saying that "as a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interest and changing conditions may require", it added:

> "Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which

Congress may determine as an incident of its power to designate the mode of ratification."

It then declared that the period of seven years fixed in that instance was reasonable, a conclusion which could not well be questioned "considering the periods within which prior amendments were ratified."

We submit that the doctrine of the *Dillon Case* supports our position in this case, in so far as it establishes the fact that Article V itself limits the time within which a proposal for amending the Constitution can be acted upon by the States. We admit that it puts upon us the burden of showing that the attempted ratification of the Child Labor Amendment by the Kentucky legislature did not come within a reasonable time after the proposal of that Amendment and we now address ourselves to that question.

It has been said that, while this Court, in the *Dillon Case,* declared that the period of seven years fixed in the proposal of the Eighteenth Amendment was not too short, in view of the much shorter time in which all other amendments had been adopted, it has never said what time would be too long. Taken literally, this is quite true, although we do not concede that the Court's approval of a limitation of seven years can be ignored. On the contrary, we think it must be given some weight in determining the effect of the declarations made by the Court in that case that ratifications widely separated in time were not contemplated by the framers of the Constitution, that a proposal for amendment is "to be considered and disposed

of presently" and that ratifications in three-fourths of the States, to be effective, "must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period."

In considering this question, in a case where Congress itself has not fixed a time limit, it is necessary to take all circumstances into account. What might be a reasonable time in one case might not be a reasonable time in another case. Let us suppose that a proposal for an amendment of the Constitution should be immediately followed by some great national calamity or a succession of calamities, whether of war or of pestilence or of famine or other misfortune, so that public interest in the proposed amendment had been eclipsed by the absorbing necessity of meeting these misfortunes and solving the problems consequent upon them, with the result that no attention had been given to the proposal, that no discussion or agitation for or against it had taken place during that time and that no action at all had been taken. In those circumstances, it might, perhaps, be said that a renewed interest in the subject, even after the passage of some years, followed by ratifications by three-fourths of the States within a period of three or four years, would not be too late, although, even in that situation, a resubmission by Congress might be necessary.

But we note how different is the case of the Child Labor Amendment. We ask the Court to look at the table at the end of this brief (Appendix A), in order to

get the history of the Child Labor Amendment at a glance. It shows that at the end of a year and a half after its proposal it had been considered and acted upon by 39 States. The verdict against it at that time was overwhelming, 35 "Nays" to 4 "Ayes". Seven years later, at the end of 1932, or eight and a half years after its proposal, 42 States had acted upon it and the vote was 38 "Nays" and 4 "Ayes", or, if the attempted reversals of position by Colorado and Montana are allowed, as claimed by Petitioners, 36 "Nays" to 6 "Ayes".

Can it be said, in view of this record, that, either at the end of 1925 or of 1932 or of any intervening year, the proposal had not been "considered and disposed of presently"? Can it be said that, "the sentiment and felt needs" of that day had not been fully demonstrated? It must be remembered that during that time no public calamity nor any overwhelming absorption in other problems had intervened to interrupt or distract attention from the consideration of this proposal. The total collapse of interest in it by the end of 1932 or, indeed, by the end of 1927, had been due solely to the fact that the action theretofore taken by 42 of the 48 States in the Union and the refusal to act by the remaining 6 States, had resulted in a universal conviction that the proposal had been overwhelmingly defeated and was no longer open to consideration. We can hardly conceive a more complete demonstration of almost universal hostility. It seems to us that, if this situation does not justify the

application of the rule that a proposal for amendment, if not adopted "within some reasonable time after the proposal", "ought to be regarded as waived and not again to be voted upon, unless a second time proposed by Congress", then the application of that rule can never be justified.

REPLY TO BRIEF FOR PETITIONERS.

In the main, the arguments advanced in the Brief for Petitioners in support of their assignment of errors have been anticipated by the foregoing argument in support of the judgment below and we shall not vex the ear of the Court by repetition. But there are one or two points to which we wish to say something by way of comment or explanation.

In a foot-note to Petitioners' "Statement of the Case" (Brief, p. 7) there appears a table, entitled, "Action in Child Labor Amendment by State Legislatures as Shown by Records of U. S. Department of State." A comparison of this tabulation with that found in "Appendix A" in this brief will, at first glance, seem to show many discrepancies but, upon a more careful scrutiny, it is seen that this appearance is deceptive. Both tables are accurate (or substantially so) but are compiled upon different bases. For one thing the record furnished by the Department of State includes, of course, only actions that have been certified to that Department, whereas our table contains adverse actions which were not so certified but

which are matters of public record. For example, the Department reports only 19 rejections in 1925, whereas our table shows 32. As has been explained above (pp. 4 and 36), the latter total is made up as follows: 20 affirmative rejections by both Houses (4 of them not certified), 9 affirmative rejections by one House (no action in other House), and 3 defeated resolutions to ratify. Thus it is seen that the two tables tally, since the affirmative rejections by one House and the defeated resolutions to ratify were not certified to Washington. So the two tables are reconciled down to the year 1933. In the five years, 1933-1937, the table of the Department of State (Petitioners' brief, p. 7) shows 21 ratifications, bringing the grand total to 27, whereas Appendix A gives 22 ratifications during that five-year period, bringing the grand total to 28. This discrepancy is due to the fact that we have given credit for 4 ratifications in 1937, including both Kansas and Kentucky, whereas the Department's table omits Kansas, since that attempted ratification has not been certified to the Department.

The great difference between the two tabulations is with respect to rejections in the five-year period, 1933-1937. The Department's table gives only one rejection in that period, whereas our table shows 57 rejections. Of course, this total contains many duplications. During that time, Massachusetts rejected the proposal five times, after having rejected it in 1925; Texas and South Dakota rejected it four times, after having rejected it in 1925; New York rejected it four times;

Florida and Missouri rejected it three times, after having rejected it in 1925; Maryland rejected it three times after having rejected it in 1927; Rhode Isand rejected it three times; Connecticut, Louisiana, Nebraska, North Carolina and South Carolina rejected it twice, after having rejected it in 1924 and 1925; Delaware, Georgia, Tennessee, Vermont and Virginia rejected it once during the last five years, after having rejected it in 1925; Alabama rejected it in 1935, through adverse committee action on a resolution to ratify.

None of the twenty States last mentioned has ever ratified the proposal. During the last five years, six States, Kansas, Kentucky, Nevada, New Mexico, Utah and Wyoming, although finally ratifying, first repeated their rejections of a decade or more ago, some of them two or three times. In 1933, when the pressure for ratifications was first exerted by a new and popular administration in Washington, 14 ratifications were obtained, in contrast with 9 rejections. But in 1934, there were no ratifications and 11 rejections; in 1935, 4 ratifications and 20 rejections; in 1936, no ratifications and 6 rejections, and in 1937, 4 ratifications and 12 rejections.

It will be noticed that in both tables actions taken during the year 1937 are included, although some of these did not take place until after the institution of this action and, therefore, do not appear in this record. While this is somewhat irregular, we trust that the Court will overlook it, since both sides are similarly at

fault. The purpose, upon both sides, was to give the Court as complete a picture as possible of the action taken by the States at the time when this Court took jurisdiction of the case.*

That portion of Appendix A which gives the record of action by the States during the five-year period, 1933-1937, is inserted to show the result of the drive for ratifications which commenced in 1933 and has continued until this time. Although we take the position that all action taken by the States during this period is ineffectual because the proposal was no longer pending at the opening of that period, we think the showing is illuminating as to persistence of hostility to the Amendment despite all proselytizing efforts.

In the brief for Petitioners, counsel take the following position in applying the rule of reasonable time laid down in the *Dillon Case*. We quote from that brief:

> "Frequent action by the legislatures of the several states with respect to a proposed amendment should be considered as keeping the proposal alive. If only a reasonable time expires between action on the proposal by one legislature and action on the proposal by another legislature, and that process continues until a large number of legislatures —less than thirty-six—have acted, then it seems reasonable that the proposal has not terminated by the elapse of time even though a period of several years has expired between the action of the

*Substantially all of the results shown by Appendix A are supported by averments in the first amended petition (R. 9) and the second amended petition (R. 12). The truth of these averments stands confessed, since the record contains no denial of their truth.

first state and the action of the last state. If a period of several years expires between the action by one legisalture on the proposal and the action by the next legislature on the proposal, then it may be considered that the proposal has terminated by the elapse of time. Also, if a period of several years has expired since the action by the last state, and the number of states having ratified is less than thirty-six, then it may be considered that the proposal has terminated by the elapse of time. Applying these principles to the proposed Child Labor Amendment we find that three years is the longest period of time that has expired during which there was no action on the proposal by any legislature. It is submitted that three years is too short a time to constitute such a period of time as would terminate the pendency of the proposed amendment."

We note in passing that upon this theory a proposal for amendment might conceivably be kept alive for many years. If, for example, there was one action every other year, the proposal would still be pending at the end of seventy years, even if all actions were ratifications; if the interval between actions was two years, it would still be pending at the end of a century, and so on.

This argument seems to us to be subject to the same criticism as the argument made by Judge Allen, of the Supreme Court of Kansas, in writing the opinion of the Court in *Coleman* v. *Miller, supra,* now under review by this Court (No. 7, October Term, 1938). In discussing the claim (to use his own words) "that the proposed amendment [Child Labor Amendment] has

lost its potency by old age," Judge Allen, after quoting at length from Judge Jameson, explained his reason for rejecting that claim as follows:

> "The history of the agitation over the child labor question since the proposed amendment is a matter of common knowledge. We have no concern with the wisdom of the proposed amendment, but of necessity must hold that the proposal 'has relation to the sentiment and felt needs of today' which seems to be the criterion adopted by the Supreme Court in Dillon v. Gloss. We therefore hold the proposed amendment retains its original vitality, and that the assent of the legislature was legally manifested by the adoption of Senate Concurrent Resolution No. 3."

We think that Judge Allen and counsel for Petitioners in this case have fallen into the same error. It will be noted that Judge Allen, in quoting from the opinion of this Court in the *Dillon Case* the phrase, which he refers to as "the criterion adopted by the Supreme Court," has omitted a very vital portion of the expression actually used by this Court. The criterion thus attributed to the Court (and it is only one of several criteria mentioned in the Dillon opinion) is stated in that opinion as follows:

> "An alteration of the Constitution PROPOSED TODAY has relation to the sentiment and the felt needs of TODAY." (Emphasis added.)

This means, of course, public sentiment as of the time when the Amendment was proposed and not the

public sentiment of a time twelve or fifteen years later. It was the sentiment of 1924, and not the sentiment of 1937 or 1938 or 1940, that was to be ascertained by the referendum of the proposal to the States. That sentiment—the sentiment of 1924—was overwhelmingly expressed within a year and a half after the proposal. At that time (to repeat what we have said so often) the proposal had been ratified by only 4 States and had been rejected by 35 States. We submit that this was conclusive and that, if it was desired twelve or fifteen years later to ascertain what the sentiment of the States was *at that later time,* it could be authorized only by a re-submission of the question by Congress.

CONCLUSION.

We would have preferred to make this brief much shorter than it is. Its length can be justified only by the novelty of the questions involved and by the paucity of judicial precedents. We have endeavored to bring to the attention of the Court, without concealment or undue partiality, such material as we have thought might assist the Court in reaching a correct conclusion.

It is hardly necessary to urge the public importance of an authoritative settlement of the doubts which have given rise to this litigation and to much of the legal literature mentioned above and set out more fully in Appendix E. Its importance is, we think, apparent. The ferment of ideas upon social, economic and politi-

cal problems which characterizes this time, particularly as to the part which government should take in the solution of those problems, makes it peculiarly important that the requirements for effecting a change in the division or extension or limitation of governmental powers established by the Constitution should be clearly understood and faithfully observed. If, as some think, the existing method of amending the Constitution should itself be amended, certainly it is important to know exactly what the existing method is.

Without more, we offer our argument in favor of the following interpretation of Article V of the Federal Constitution:

That when a State takes affirmative action on a proposal for amendment of the Federal Constitution, whether by ratifying or rejecting it, its power is exhausted and its action upon that proposal cannot be retracted:

That when more than one-fourth of the States have affirmatively rejected such a proposal, the fate of that proposal is determined as conclusively as it would have been if three-fourths of the States had ratified it, even if a State had the power, prior to such determination, to reverse the action theretofore taken by it:

That, in view of the history of the proposal of the Child Labor Amendment before the States, a reasonable time for its adoption had expired and it was no longer pending or open to action by any State at the time when the Kentucky legislature attempted to ratify the proposal, even though its original power to act

had not theretofore been exhausted by the first exercise thereof nor had been terminated by the antecedent defeat of the proposal by the adverse votes of more than one-fourth of the States.

We ask that the judgment of the court below be affirmed.

Respectfully submitted,

LAFON ALLEN,
OLDHAM CLARKE,
Solicitors for Respondents.

October 1, 1938.

APPENDICES.

Appendix A.: Table showing action by States on Child Labor Amendment, 1924-1937, inclusive 1– 2

Appendix B.: Federal Constitution, Article V; Act of Congress, April 20, 1818. 3

Appendix C.: Resolution of Kentucky legislature, March 24, 1926, rejecting Child Labor Amendment 4– 5

Appendix D.: List of recent legal literature on constitutional amendment 6–10

APPENDIX A.

ANNUAL RECORD OF ACTION BY STATES ON CHILD LABOR AMENDMENT, PROPOSED JUNE 2, 1924: 1924 TO 1937, INCLUSIVE.

NOTE: "Annual Totals" show number of States acting in each year.
"Respondents' Cumulative Totals" include only first action of States to end of each year, excluding all reversals of position.
"Petitioners' Cumulative Totals" include ratifications to end of each year, excluding all former rejections.

X indicates ratification; O indicates rejection.

	1924		1925		1926		1927		1928		1929		1930		1931		1932		1933		1934		1935		1936		1937	
	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No
Alabama																								O				
Arizona			X																									
Arkansas	X																											
California			X																									
Colorado				O											X													
Connecticut				O																				O				O
Delaware				O																				O				
Florida				O																O				O				O
Georgia		O																						O				O
Idaho				O																			X					
Illinois																			X									
Indiana				O*	*(Thirteenth affirmative rejection, March 5, 1925)																		X					
Iowa				O															X									
Kansas				O																O		O		O		X		
Kentucky						O																O				X		
Louisiana		O																				O			O			
Maine				O															X									
Maryland								O												O				O				O
Massachusetts				O																O		O		O		O		O
Michigan				O															X									
Minnesota				O															X									
Mississippi																						O				O		
Missouri				O																O				O				O
Montana				O			X																					
Nebraska				O																				O				O
Nevada				O																				O		X		
New Hampshire				O															X									
New Jersey																			X									
New Mexico				O																		O		O		X		
New York																						O		O		O		O
North Carolina		O																						O				O
North Dakota				O															X									
Ohio				O															X									
Oklahoma				O															X									
Oregon				O															X									
Pennsylvania				O															X									

Georgia		O																							O				O					
Idaho				O																					X									
Illinois																					X													
Indiana				O*	*(Thirteenth affirmative rejection, March 5, 1925)																				X									
Iowa				O																	X													
Kansas				O																		O		O		O			X					
Kentucky						O																		O					X					
Louisiana		O																						O			O							
Maine				O																	X													
Maryland							O															O			O			O						
Massachusetts				O																		O		O		O		O						
Michigan				O																	X													
Minnesota				O																	X													
Mississippi																								O			O							
Missouri				O																		O				O			O					
Montana				O		X																												
Nebraska				O																								O			O			
Nevada				O																								O		X				
New Hampshire				O																	X													
New Jersey																					X													
New Mexico				O																				O		O			X					
New York																								O		O		O		O					
North Carolina		O																								O				O				
North Dakota				O																	X													
Ohio				O																	X													
Oklahoma				O																	X													
Oregon				O																	X													
Pennsylvania				O																	X													
Rhode Island																								O		O		O						
South Carolina				O																				O		O								
South Dakota				O																		O				O				O				
Tennessee				O																						O				O				
Texas				O																		O		O		O				O				
Utah				O																		O			X									
Vermont				O																						O								
Virginia						O																		O										
Washington				O																	X													
West Virginia				O																	X													
Wisconsin			X																															
Wyoming				O																		O			X									
ANNUAL TOTALS:	1	3	3	22	0	2	1	1	0	0	0	0	0	0	1	0	0	0	14	9	0	11	4	20	0	5	4	12						
Respondents' Cumulative Totals:	1	5	4	35	4	37	4	38	4	38	4	38	4	38	4	38	4	38	6	38	6	41	6	42	(All States In)									
Petitioners' Cumulative Totals:	1	3	4	35	4	37	5	37	5	37	5	37	5	37	6	36	6	36	20	24	20	26	24	24	24	24	28	20						

("Rejections," indicated by O include all adverse action, whether affirmative rejection by both houses of a legislature, affirmative rejection by one house, defeat in one or both houses of motions to ratify, etc. For the years 1924-1932, inclusive, the classification of these rejections according to their nature is shown on pages 4 and 36 of the brief.)

APPENDIX B.

Federal Constitution, Article V:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which in either Case shall be valid to all Intents and Purposes as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner effect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Act of Congress of April 20, 1818

(U. S. Rev. Stats., §205, 5 U. S. C. A., §160):

"160. Amendments to Constitution. Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

APPENDIX C.

ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY 1926

CHAPTER 345; SENATE RESOLUTION No. 12.

"A Concurrent Resolution providing for the rejection of the proposed twentieth amendment to the Constitution of the United States, being the so-called child labor amendment to said Constitution.

"Whereas, the Congress of the United States has proposed an amendment to the Constitution of the United States of America in the following words, to-wit: 'Joint resolution proposing amendment to the Constitution of the United States of America in Congress assembled, two-thirds of each House concurring therein, that the following article is proposed as an amendment to the Constitution of the United States, which when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the Constitution.

" 'Section 1. That Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

" 'Section 2. That power of the several state is unimpaired by this article except that the operation of the state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress,' and

"Whereas, in the opinion of the majority of the members of the General Assembly of Kentucky, said proposed measure violates the principle of local self-government, inasmuch as the states are asked to surrender a power which is peculiar to the states, and

"Whereas, in the opinion of the members of the General Assembly of Kentucky, there can be no real liberty where such important personal rights may be limited, reg-

ulated and prohibited to the extent proposed in the twentieth amendment to the Constitution of the United States in which it is sought to give Congress the power to enter the homes for the purpose of regulating the child life, even to the extent of actually prohibiting all labor of persons under eighteen years of age; therefore,

"Be it resolved by the Senate of Kentucky, the House of Representatives concurring therein:

"§1. That the said proposed Amendment to the Constitution of the United States of America be, and the same is hereby rejected by the General Assembly of the Commonwealth of Kentucky.

"§2. That certified copies of this Concurrent Resolution be forwarded by the Governor of this Commonwealth of the Secretary of State in Washington, D. C., and to the Presiding Officer of the United States Senate and the Speaker of the House of Representatives of the United States."

"Approved March 24, 1926."

APPENDIX D.

Abbott, Everett V.: "Inalienable Rights in the Eighteenth Amendment"; 20 Columbia L. R. 183.

Ames, Herman V.: "The Proposed Amendments to the Constitution"; p. 291.

"The Amending Provision of the Federal Constitution in Practice"; LXIII Proc. Am. Phil. Soc., No. 1, p. 62.

Anon.: "The Child Labor Amendment and the Amending Process"; LXXII U. S. Law Review 151.

"Was the Fourteenth Amendment Adopted?" XXX Am. Law Review 761.

"The Fourteenth Amendment Was Adopted"; XXX Am. Law Review 894.

Arneson, Ben A.: "Is It Easy to Amend the Constitution?" LX Am. Law Review 600.

Brown, George Stewart: "The People Should Be Consulted as to Constitutional Changes"; XVI Am. Bar Asso. Journal 404.

"Irresponsible Government by Constitutional Amendment"; VIII Va. Law Review 157.

"The New Bill of Rights Amendment"; IX Va. Law Review 14.

Burdick, C. K.: "The Law of the American Constitution," p. 36.

Butler, Nicholas Murray: "Some Problems for Our Government"; Address, Southhampton, L. I., Sept. 6, 1936.

"The Constitution 140 Years After"; 12 Const. Rev. 121.

Burgess, John William: "Recent Changes in American Constitutional Theory"; 107, 112.

Cadwalader, Thomas F.: "Amendment of the Federal Constitution"; LX Am. Law Review 389.

Clinglesmith, Margaret C.: "Amending the Constitution of the United States"; 73 Univ. of Pa. Law Review 355.

Davis, John W.: "Present Day Problems"—Address of the President; 48 Rep. Am. Bar Asso. 201.

Dodd, W. F.: "Amending the Federal Constitution"; XXX Yale Law Journal 321.

"Judicially Non-Enforceable Provisions of the Constitution"; 80 Univ. of Pa. Law Review 54.

Frierson, Wm. L.: "Amending the Constitution of the United States"; 33 Harvard Law Review 659.

Freund, Ernst: "The Prohibition Amendment and Consent Requirements and Time Limits"; 7 Am. Bar Asso. Journal 656.

Garrett, Finis J.: "Amending the Federal Constitution"; 7 Tenn. Law Review 286.

Grinnell, Frank W.: "The Finality of State's Ratification of a Constitutional Amendment"; XI Am. Bar Asso. Journal, p. 192.

"A 'Point of Order' on the 'Child Control' Amendment"; XIX Mass. Law Quarterly, No. 5, p. 23.

Goodnow, Frank J.: "Judicial Interpretation of Constitutional Provisions"; III Academy of Pol. Sci. Proc. 49.

Guthrie, William D.: "The Federal Child Labor Amendment"; Vital Speeches, Vol. I, No. 9, p. 271.

"The Child Labor Amendment"; pamphlet, New York, March, 1934.

Hall, James Parker: "An Eighteenth Century Constitution—A Comment"; VII Ill. Law Review 285.

Holding, A. M.: "Perils To Be Apprehended in Amending the Constitution"; 57 Am. Law Review 481.

Horwill, Herbert William: "The Usages of the American Constitution"; 220.

Hughes, Robert M.: "Can a State Prescribe a Breathing Spell before Its Legislature Acts upon a Proposed Amendment to the Federal Constitution?" XIV Va. Law Review 191.

Johnstone, Frederick Bruce: "An Eighteenth Century Constitution"; 7 Ill. Law Review 265.

Lanier, Alexander Sidney: "Amending the Federal Constitution"; IX Va. L. Reg. (N.S.) 81.

Lincoln, Alexander: "Ratification by Conventions"; Pamphlet, Boston, Apr., 1933.

Long, Joseph R.: "Tinkering with the Constitution"; XXIV Yale L. J. 573.

Lunt, Dudley C.: "Amending the Constitution"; XXIII L. & B. & Cent. L. J. (N.S.) 252.

MacDonald, William: "A New Constitution for a New America" (1921).

Machen, Arthur W., Jr.: "Is the Fifteenth Amendment Void?" XXIII Harvard Law Review 169.

Marbury, William L.: "The Limitation upon the Amending Power"; XXXIII Harvard Law Review 223.

"The Nineteenth Amendment and After"; VII Va. Law Review 1.

Mathews, John Mabry: "The American Constitutional System"; p. 39.

McGovney, D. O.: "Is the Eighteenth Amendment Void Because of Its Contents?" 20 Columbia L. R. 499.

Miller, Justin: "Amendment of the Federal Constitution—Should It Be Made More Difficult?" LX Am. Law Review, No. 2, p. 181. X Minn. Law Review 185.

Moschzisker, Chief Justice: "Dangers in Disregarding Fundamental Conceptions When Amending the Federal Constitution"; XI Cornell L. Q. 1.

Mussman, Michael Angelo: "Is the Amendment Process Too Difficult?" 57 Am. Law Review 694.

Musmanno, M. H.: "The Difficulty of Amending our Federal Constitution; Defects"; 15 Am. Bar Asso. Journal 505.

Needham, Charles Willis: "Changing the Fundamental Law"; 69 Univ. of Pa. Law Review 223.

Orfield, Lester B.: "The Reform of the Federal Amending Power"; X No. Car. Law Review, No. 1, p. 16.

"Procedure of the Federal Amending Power"; XXV Ill. Law Review 418.

"The Federal Amending Power: Genesis and Justiciability"; XIV Minn. Law Review 369.

"The Scope of the Federal Amending Power"; XXVIII Mich. Law Review 550.

"Sovereignty and the Federal Amending Power"; XVI Iowa Law Review 391, 504.

Platz, William A.: "Article V of the Federal Constitution"; 3 George Washington Law Review, No. 1, p. 17.

Potter, William P.: "The Method of Amending the Federal Constitution"; 57 Univ. of Pa. Law Review 589.

Raymond, Lowell W.: "Law and Procedure Incident to Amending the Federal Constitution"; 36 Case and Comment, No. 1, p. 2.

Smith, Munroe: "Shall We Make Our Constitution Flexible?" 194 No. Am. Rev. 657.

Skinner, George D.: "Intrinsic Limitations on the Power of Constitutional Amendment"; 18 Mich. L. R. 213.

Taft, William H.: "Can Ratification of an Amendment to the Constitution Be Made to Depend on a Referendum?" XXIX Yale Law Journal 821.

Thayer, James Bradley: "Our New Purposes"; 12 Harvard Law Review 464.

Thompson, "The Amendment of the Federal Constitution";
3 Academy of Pol. Sci. Proc. 65.

Westervelt, George Norten: "Amend Article V";
24 L. B. & Cent. L. J. 166.

Wheeler, Wayne B.: "Is a Constitutional Convention Impending?"
XXI Ill. L. R. 782.

"May Ratification by a State of an Amendment to the Federal Constitution Be Repealed?"
20 Case and Comment, p. 548.

"How Long Is a State Petition for a Constitutional Convention Good?"
17 Am. Bar Asso. Journal 143.

Williams, Bruce: "The Popular Mandate on Constitutional Amendments";
VII Va. L. R. 280.

Willis, Hugh E.: "The Part of the United States Constitution Made by the Supreme Court";
XXIII Iowa L. R. 165.

Willoughby, Westel W.: "Principles of the Constitutional Law of the United States";
Ch. XXXII, §214.

White, Justin DuPratt: "Is There an Eighteenth Amendment?"
V Cornell L. Q. 89.